

FOI – Ombudsman’s Own Motion Investigation

The final report from the Ombudsman’s two year long own motion investigation into FOI in Victoria was tabled in Parliament on 1 June this year.

Before going to the report, it is appropriate to recall what the then Premier, John Cain, said in his Second Reading Speech in introducing the FOI Bill in 1982:

Freedom of Information is very closely connected with the fundamental principles of a democratic society and is based on three major premises:

1. The individual has a right to know what information is contained in Government about him or herself.
2. A Government that is open to public scrutiny is more accountable to the people who elect it.
3. Where people are informed about Government policies, they are more likely to become involved in policy making and in Government itself.¹

Those principles, which underpin the *FOI Act*, are still just as applicable today, 24 years later.

The Ombudsman’s investigation related to the 10 government departments and the Victoria Police. A discussion paper was released in May 2005, which I discussed in the VGSO seminar in May 2005.

Sixty-three submissions were received in response to the discussion paper, including from the agencies investigated, plus a whole of government submission coordinated by DOJ. The Ombudsman then went through a process of examining 100 FOI files. The departments had the opportunity to comment on the review before it was finalised.

Before going to the review, I provide some figures which paint the broad picture of the way in which FOI operates in Victoria today:

- The number of FOI applications has continued its steady rise, up again from 20,896 (in 2003/4) to 22,493 (in 2004/5).
- The number of VCAT FOI reviews was down again from 104 (in 2003/4) to 93 (in 2004/5). (The peak was 304 in 1997/98).

- Of those 93, 63 involved the 10 departments or Victorian Police. Of these 63, 36 were resolved in some way before hearing and 27 were determined by VCAT. Of those 27, the decision was upheld by VCAT in 18 cases, partial release was granted in eight cases, and full access in one case.
- The 10 agencies account for only 18% of FOI requests, but generate a much higher rate of refusals, and 63% of all VCAT reviews.
- The police remain the busiest agency, with 1,949 requests in 2004/5 (although it is noted this is down from 2,198 in 2003/4).

When the own motion investigation was finally tabled, this was the headline.² I think it slightly over dramatised things, as newspapers do. Overall, I felt the tone was slightly more muted than previously, but nevertheless the report did refer to a number of shortcomings in the way that many agencies discharged their duties under the *FOI Act*.

The key findings in relation to the ten departments and Victoria Police were in the areas of:

- delay;
- interpretation of requests;
- multiple requests;
- resources;
- procedures; and
- reasons for decisions.

The report also dealt with:

- Part II statements;
- leadership and open government; and
- legislative review.

Delay

Delay was identified by the Ombudsman as the key issue, although the position had definitely improved somewhat by the time the report was tabled. Only 56% of decisions by government departments were made within the 45 day limit in 2003/4. However, following significant improvement by DHS, in particular, this is up significantly, (such that for the first eight months of the 2005/6 financial year 69% of decisions by the 10 departments were made within the 45 day time limit).

Since there are a few more positives relating to departments whose representatives may be here today, I mention:

- Since April 2004, DET has processed *all* requests it has received within the statutory time frame.
- Since 1 July 2005, DPC has processed *all* requests it has received within the statutory time frame and recorded its lowest average finalisation time of 18 days for August 2005.
- DOJ’s rate of compliance with the time limit has steadily improved. It is now up to 66%.

In fact, by the end of 2005/6, the average for the 10 departments is now up to 71%, and for DOJ, 73%.

The Ombudsman concluded that searching for documents and consulting with third parties does not cause significant delays in the overall scheme of things. Sometimes, delays are caused by poor procedures or lack of resources, but these comments should be looked at in the context of the general improvement across the approximately 500 agencies in relation to time taken to respond to FOI requests.

However, the Ombudsman did reach one specific conclusion: that in relation to many requests, delay is caused by the process of briefing the relevant Minister, or Minister’s office, about the proposed release of policy sensitive documents and awaiting the return of the briefing note, annotated to indicate it has been ‘noted’ by the Minister.

This process was formally recognised in the Attorney General’s Improved Accountability Guidelines for FOI, issued in 2002 in response to the previous Ombudsman’s concerns about FOI issues. These state:

In all instances where documents relate to a Minister’s portfolio (except personal requests) and/or where the Minister could be asked by the media or in Parliament to comment or explain, the agency will provide a brief to the Minister. This is done 5 days prior to the proposed release. . . It is not the responsibility of the FOI officer to follow up the Chief of Staff or the Premier’s Office if no input is received by the proposed release date.

The Ombudsman acknowledged that this is an appropriate process. That is, it is fair enough for the Minister’s office to be forewarned about the release of sensitive documents, so it can be prepared to respond to any publicity to which this gives

rise. While sometimes, the involvement of the Minister’s office contributed to the response (eg extra relevant documents were disclosed), there were instances where members of the executive, or Minister’s staff, appeared to have suggested changes to proposed decisions. The Ombudsman pointed out that this is inconsistent with the purpose of the procedure for briefing the Minister’s office, and the principle in the guidelines that it is *FOI officers* who should make the decisions. However, he did *not* find political interference in FOI decisions. Rather, he commented that such delays may lead to the *perception* of political interference.

The report contains a number of case studies. The worst of these, in relation to delay, reads as follows:

Internal review took 160 days. The proposed internal review decision remained with first the department’s executive and then the Minister’s office for lengthy periods. The decision was further delayed waiting on the preparation of PPQs [possible Parliamentary questions]. The original decision to refuse access to documents had obvious problems and was most likely incorrect. One of the problems identified included the decision to exempt certain information because a third party who was consulted objected to its release, despite having no reason or basis for the objection. There was no reference on file to these problems, which appear to have been completely overlooked in the internal review.³

This is really the worst case the Ombudsman found. I note that in his 2005 Annual Report, the Ombudsman referred to a case in which a Department handed documents over to an opposition MP

immediately prior to a VCAT hearing, and another Department held onto documents well after it became aware that exemptions were no longer applicable which the Ombudsman criticized as not in keeping with the State’s obligation to act as a model litigant.

In general, however, the flavour seems to be that these are examples of processes from ‘the bad old days’, which are becoming increasingly rare.

Interpretation of Requests

The Ombudsman found that:

Departments at times construed requests in unusual ways which minimised the number of documents that might be disclosed. On other occasions, requests were said to be ‘unclear’ but a later revision of the request, almost identical in its terms was accepted. Typically in cases where clarification was required, the department took no active steps to assist the applicant.⁴

In terms of refining requests, the Ombudsman acknowledged the view that it is not the role of FOI officers to ‘steer’ applicants either toward or away from documents (which might be used to give adverse publicity to departments) but noted that departments do have a duty under s 17(3) to assist applicants to make clear and non-voluminous requests, and generally to provide applicants with information about the various types or classes of documents the agency holds, rather than playing ‘cat and mouse’ games with applicants.

In another case study (Case 7) the Ombudsman said:

On the 44th day after a request was received, the department asked the applicant to clarify it and suggested that, if not clarified, the request might be voluminous.

The request appeared quite clear in its terms. No information was recorded on the file to indicate how the request was unclear or to justify the assertion that the request was potentially voluminous, or to show any assessment of the resources needed to process it.⁵

And in another case study (Case 13):

Access was provided to a document but with all parts of the document not directly relevant to the subject of the request deleted. The applicant was provided with a patch-work document of odd photographs or parts of paragraphs, from which the surrounding contextual material had been deleted, purportedly on the basis of an earlier VCAT decision that, where a document relates to a number of subjects, only those parts which are relevant to the terms of the request need to be provided.⁶

The Ombudsman returned to his theme that departments should contact applicants by telephone to clarify and narrow down requests into non-voluminous form.

Also, in relation to editing out the relevant material the Ombudsman said:

My investigation revealed that some departments and other agencies have the practice of deleting or not providing copies of distinct parts or sections of documents that are not relevant to the request. On occasion, some agencies delete or blank out any material, including single sentences in short documents such as emails, which do not relate directly to the topic of the request. The latter is an extreme approach that

does not seem to find any basis in the Act and which risks the release of material that is distorted or misleading by reason of the deletion. In some cases it clearly required more time and effort to edit and delete the ‘irrelevant’ material than would have been involved in releasing the entire document.⁷

The Ombudsman recommended that the Act be altered to accord with the effect of the Commonwealth Act, which he said was that editing occurs where it is both practicable, and not contrary to the applicant’s known wishes.

In fact, s 25 of the *FOI Act* was amended earlier this year to reflect the common practice of deletion of material irrelevant to a request.

Multiple FOI Requests

Sometimes multiple FOI requests are lodged with an agency. (An example given was when an opposition MP lodged thirteen separate FOI requests with an agency on one day.) The Ombudsman does not believe, however, that multiple requests constitute a significant problem overall, and recommended that agencies consult with applicants as to the priority of different requests.

Resources

Victoria Police FOI officers each handle an average of 200 requests per annum. This is four times the average number handled by the ten departments. The Ombudsman thought that the Victoria Police FOI unit could be understaffed.

He also recommended that departments look at software which DHS is utilising, which enables them to edit electronically

scanned copies of documents, with a considerable saving in time over the previous manual methods. This is particularly useful where there are large volumes of material to be edited before release, and has helped to improve processing times within those agencies.

Procedures

The Ombudsman recommended that where consultation is required with a commercial undertaking under s 34, or where personal information is sought under s 33, the Act should be amended to allow extension of the 45 day period by another 30 days.

However, the Ombudsman retreated from his suggestion in the earlier discussion paper that piecemeal release of information occur as a means of getting some information out more quickly. This is on the basis that both agencies and applicants would find that this would cause confusion.

Nor did the Ombudsman pursue the suggestion floated earlier that his monitoring role in relation to FOI be increased.

Reasons for Decision

Section 27(1)(a) imposes on agencies an obligation to provide reasons for decision on FOI requests, including findings on material questions of fact.

The Ombudsman found that this is usually honoured in the breach. He said that in most cases the reasons for decision were perfunctory, formulaic, failed to state material facts and failed to disclose the reasoning process. In a few cases the reasons lacked candour and were misleading.

Agencies tend not to give any description or enumeration of any documents to which access is denied, nor indicate which exemptions apply to which document.

DOJ submitted that providing VCAT s 49 style reasons, and schedules of documents, would be unduly burdensome on agencies when only half of a percent of requests go to VCAT. The Ombudsman recommended that this be implemented where practicable and that in other cases the quality of letters conveying the outcome of FOI applications be improved. In particular, letters should state the findings of fact upon which decisions to rely on exemptions are based, and give some meaningful description of the documents which are exempt in whole or in part. This should be achieved by way of a practice note to be published by DOJ. He pointed out that departments often prepare such lists for internal purposes in processing FOI requests, without providing them to applicants.

Part II Statements

Part II of the *FOI Act* requires that agencies publish annual statements detailing the agency's organisation and functions, categories of documents it holds (including reports of various types) procedures for obtaining information, and other matters. Part II is out of date, given that agencies now publish extensive information on web sites. They also produce annual reports, which contain information required to be included under other Acts, such as the *Financial Management Act 1994* and the *Whistleblowers Protection Act 2001*.

Departments do not generally produce separate statements under Part II, having made the judgment, frankly, I think, that literal compliance would not be an effective use of their scarce resources.

Occasionally, however, they are required to respond to requests for information under Part II by opposition MPs or the media.

The Ombudsman pointed out that it is not acceptable for agencies to ignore statutory provisions such as Part II. But he acknowledged that it is out of date, and recommended that as a matter of urgency it be reviewed, with a view to adopting a model akin to that operating in the UK, under which each agency adopts its own publication scheme approved by the Information Commissioner for the dissemination of relevant and useful material.

Also relevant to this is the ongoing modification and 'electronicification' of departmental records across government.

Leadership and Open Government

The Ombudsman expressed the view that DOJ should take a more proactive role in providing guidance to agencies, co-ordinating the quality of responses to FOI throughout government, and providing leadership in setting the culture within which FOI requests are handled.

He suggested that the steps the Secretary of DOJ had already taken be beefed up further with the resumption of the practice from the early days of FOI, whereby the Attorney-General's department published Guidelines for the implementation of the Act.

Specifically, the Ombudsman recommended that DOJ do three things:

- Provide pro forma forms and letters to guide agencies in best practice response to FOI applications;

- Publish Practice Notes providing a detailed guidance to the application of the Act;
- Maintain a current awareness service for all FOI agencies, advising of new developments in legislation and case law.

Legislative Changes

The Ombudsman considered that a comprehensive review of the Act was not required. But he did recommend certain legislative changes.

FOI and Privacy

The report referred to the potentially opposing aims of the *FOI Act* on the one hand (the fullest possible dissemination of information) and the *Information Privacy Act 2000* and the *Health Records Act 2000* on the other (restricting the provision of personal information).

The Ombudsman concluded that there is in fact little conflict between these two different categories of statute.

Where they do intersect is of course in the area of information about ‘personal affairs’ under s 33 of the FOI Act, where FOI overrides the privacy provision.

The Ombudsman recommended that the FOI Act be amended to adopt the *Privacy Act*’s definition of ‘personal information’ in order to harmonise the FOI Act with the Privacy Acts.

He also concluded that the idea he had floated in the discussion paper that there be a single statutory regime bringing together FOI, privacy and public records, was not necessary.

Outsourced Work

The report recommended that where agencies outsource functions, they should ensure that the terms of the contract give the agency a right to access all documents produced in the course of performing those functions. In this way, documents created by the service provider (as opposed to those created by the agency) would nevertheless be able to be obtained under FOI on the basis that the agency has ‘constructive possession’ of them (in accordance with relevant rulings of VCAT and the AAT).

Other Recommendations

The report also made the following recommendations:

- That agencies be more amenable when an applicant requests production in electronic form.
- That the Attorney-General impose consistency between agencies in relation to the policy on waiving or reducing the \$21.50 FOI application fee and charges for copying, searching time, etc. Agencies presently apply a wide variety of approaches to this.
- That VCAT be given power to declare an applicant vexatious. He cited the example of an applicant who made sixty requests to an agency.
- To exclude the further sixty day ‘reverse FOI’ waiting period when a third party has consented to the release of documents which relate to them.

- Clarify that when there is a finding that there are no documents which answer a request, internal review and review by VCAT do not apply – the avenue available to the applicant is review by the Ombudsman.
- And finally, there is a recommendation relating to the situation where an applicant complains against a refusal under s 25A voluminous or self evidently hopeless requests. At present there is a provision requiring that the Ombudsman deal with such a complaint within 21 days. He recommended that this time limit be repealed.

Conclusion

In summary, my reading of the report, especially in the context of earlier comments and the May 2005 discussion paper, is that whilst there are still a number of areas where the Ombudsman is critical of agencies, overall, the situation is improving.

He concludes that delay is the key issue, especially as contributed to by Ministerial and executive offices. And there are still some pockets of Government where there is a culture of unhelpful, narrow, over-literal responses to requests. Also, reasons for decisions could be improved.

On the positive side, the Ombudsman praised officers' responses to personal requests as generally admirable. And clearly, delays overall are lessening.

Whilst acknowledging the steps already taken by DOJ, he urged DOJ to take a stronger leadership role in encouraging an appropriate culture, and also, guiding,

coordinating and teaching, in particular in relation to agencies other than the 10 Departments and Victoria Police. There is also the suggestion that FOI officers, who are generally conscientious in their duties, need to be supported by senior public servants and Ministers' offices demonstrating a commitment to the letter and spirit of FOI.

In this way, FOI can fulfil its important role in our democracy by facilitating the dissemination of information, which I referred to at the outset.

The Government's response to the Ombudsman's report

Upon the release of the report, the Attorney-General stated the Government would act to implement the Ombudsman's recommendations to improve administrative processes. DOJ has already consulted with agencies in relation to these recommendations, and will be issuing practice notes to guide agencies in the operation of the Act.

These are likely to cover matters such as:

- drafting of letters conveying the outcome of FOI applications, so as to explain better how the exemptions apply, and the nature of the documents to which they apply;
- assisting applicants to make requests in a form which is valid under s 17(2);
- voluminous requests;
- constructive possession;
- deletion of irrelevant material, and

- consistency of approach to fees and charges.

The legislative changes (which as I said fall short of wholesale review) will be looked at, but the Attorney indicated these are broadly supported.

So, overall, while things are still some way short of perfection, they are heading in the right direction.

¹ *Hansard*, 14 October 1982, 1061.
² ‘Deception, secrecy’ hinder FOI, Ombudsman Report Accuses Government – *The Age*, page 1 headline, Friday 2 June 2006.
³ *Case study 2*, page 24.
⁴ at page 26.
⁵ *Case study 7*, page 30.
⁶ *Case study 13*, page 44.
⁷ at page 29.